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VIA E-MAIL AND U.S. MAIL

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
OUSD (AT&L) DPAP (DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062.

Re: DFARS Case 2004-D010

Dear Ms. Williams:

Sheppard Mullin Richter & Hampton LLP hereby submits its comments in response to the Department of Defense ("DoD") proposed amendment of the Defense Federal Acquisition Regulation Supplement ("DFARS"), published on July 12, 2005, in 70 Fed. Reg. 39976. The proposed rule would impose new requirements aimed at preventing the unauthorized disclosure of export-controlled information and technology under all DoD contracts for research and development, and under DoD contracts for services or supplies that may involve the use or generation of export-controlled information or technology. We do not believe the Defense Acquisition Regulation ("DAR") Council should adopt the proposed requirements because they will result in new, substantial and unjustified administrative burdens on all DoD contractors, but in particular on small and medium-sized entities that can least afford the unnecessary costs associated with those burdens.

Under the proposed DFARS Subpart 204.73, and the associated contract clause DFARS 252.204-70XX, the contractor is required to maintain "unique badging requirements for foreign nationals and foreign persons and segregated work areas for export-controlled information and technology," DFARS 252.204-70XX(d)(1). In addition, the proposed contract clause requires that the contractor conduct initial and periodic training on export compliance controls for employees with access to controlled information, as well as periodic assessments to ensure full compliance with federal export laws and regulations. DFARS 252.204-70XX(e).

Moreover, the proposed rule directs contractors to flow down the new requirements to subcontractors. DFARS 252.204-70XX(g).

The published proposal explains that the "rule is not expected to have significant economic impact on a substantial number of small entities . . . because all contractors, including small entities, are already subject to export-control laws and regulations." 70 Fed. Reg. at 39977. While it is correct that government contractors already are subject to such export-control regimes as the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"), the proposed rule unmistakably imposes new obligations. Specifically, the proposed requirements for badging, segregated work areas, initial and periodic trainings and assessments are all examples of completely new contract requirements.

Such new requirements impose a significant economic and administrative burden. For example, often the export of controlled information falls within the ITAR exemptions found at 22 C.F.R. 125.4(b)(1), allowing the export of "[t]echnical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;" or 22 C.F.R. 125.4(b)(2), allowing the export of "[t]echnical data, including classified information, in furtherance of a manufacturing license or technical assistance agreement approved by the Department of State . . . [.]" In these situations DoD contractors have been able to comply fully with the existing export-control laws and regulations without instituting a separate badging system, segregating their work areas, or performing formal trainings and assessments. The proposed rule, in contrast, requires compliance with all these measures regardless of the existing ITAR or EAR exceptions.

Furthermore, by entering into a manufacturing license or technical assistance agreement, DoD contractors currently take on certain contractual obligations regarding the handling of export-controlled information. Those obligations are imposed by the applicable regulations, including 22 C.F.R. 125.7, 125.8 and 125.9, and enforced by the Office of Defense Trade Controls Licensing within the Department of State. The published proposal, however, seeks to impose new requirements for handling the same information, effectively creating a parallel regulatory regime to be enforced by the DoD. This, in itself, puts two potentially different sets of standards in potential conflict.

Another example of how the proposed rule reaches beyond the existing regulations is the new badging requirement, which applies to "foreign nationals and foreign persons." Currently, under 22 C.F.R. 120.17, "export" is defined in terms of "foreign persons" only. Thus, the transfer of information to foreign nationals who are lawful permanent residents of the United States, and hence not "foreign persons," is not an "export." 22 C.F.R. 120.16. Accordingly, any badging of such individuals is no more justified under the regulations than badging United States citizens.

Beyond the specific examples, however, the published proposal generally fails to explain the purpose of the new regulations. Requiring contractors to conduct periodic training and assessments, for instance, suggests that contractors' widespread lack of familiarity and compliance with the EAR or ITAR requirements is the impetus behind the proposed rule. But the DAR Council does not, and in all fairness could not, provide any support for this position. Therefore, the proposed requirements add little value to either the contractors or the DoD, while at the same time creating significant economic and administrative burdens.

Because the proposed rule clearly imposes significant new obligations, most contractors would need to expend administrative and financial resources on compliance. Small and medium sized contractors especially would be forced to engage the services outside parties, at a minimum to conduct the formal training programs and periodic assessments that have heretofore not been required of contractors. In addition, under the proposed flow-down provision, these obligations would apply to even the lowest-tier subcontractor. Considering that all government contractors already are, and will continue to be, subject to the existing export-control laws and requirements, the administrative and financial burden that would accompany the proposed rule is unwarranted.

Very truly yours,

Aleksander Lamvol

for SHEPPARD MULLIN RICHTER & HAMPTON LLP